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THE CONSERVATION OF OUR NATURAL RE- SOURCES AND OF OUR NATIONAL STRENGTH AND VIRILITY.

The enlightened thought of America is, to-day, becoming more and more directed towards the great need of the conservation of our national resources and of our national strength and virility, and more and more does it call out against the prodigal waste of life, and health and natural resources which have, in the past, so characterized our national growth. And yet few have realized how necessary to our courts is a knowledge and a consideration, not merely of the law and of the decisions of the past, but of political economy and sociology and of the history of industrial evolution. All law and all legal decisions must ultimately depend upon a popular support, and the public will never be satisfied if the courts—when confronted with great questions which are economic and social, and political as well as legal, and which involve our national life and prosperity—try to resolve them, not in the light of facts and of science, but in that merely of authority and of precedent. Too often, for instance, our courts—when they sustain child labor laws—sustain them, or at any rate justify their decisions, not on the broad ground of the necessity for such legislation and the fact that the child is the

future citizen and in his health and morality and virility the future of the nation depends, but on the theory that he has always been looked upon as a ward of the state and the state can legislate concerning him differently than it can for adults and largely as it pleases. With this line of reasoning the public is not satisfied. It cares nothing for legal refinement. The fact is, that the child in the early English law was looked upon as a ward of the state merely because the feudal king, or lord (who were then in a large sense the state) were interested in his or her marriage, and derived a fee therefrom, and were also interested in the succession to real property as its owner would be their vassal and their follower—"their man."

We have gotten far ahead of these primitive ideas and our courts must, if we are to progress and our laws are to have the support of an enlightened public mind and conscience, sustain these and similar statutes on the grounds of their present necessity and justice and reasonableness, and not on those of medieval feudalism. There is, indeed, no necessity for this kind of reasoning and justification. But for the fifth and fourteenth amendments to the Federal Constitution, and their counterparts, which have been engrafted into the Constitutions of the several states, there would be no guarantees of personal or property rights whatever in our American law¹ and, as in England, our legislative bodies would be supreme. And even the guarantees of property and of liberty and the stability of contracts, which the constitutional provisions contain, have never in the minds of thoughtful men, or of the courts themselves—when these courts have been compelled to fairly and squarely face the issues—ever been construed to guarantee unrestricted liberty or unlimited contractual or property rights. The rights guaranteed have always been deemed subordinate to the doctrine that the public welfare is the highest law, and the theory that even the right to individual liberty and property must yield to the paramount demands of

¹ Except that involved in the denial to the States of the power to impair the obligations of contracts. See Art. I, Sec. 10.

the public welfare and the public necessity. Therefore, we should justify child labor statutes, to-day, on the theory that the welfare of the child is a matter of paramount state concern, and often restrict liberty farther than it was ever restricted before, because we have come to realize that restrictions which—formerly and in a different social organization—were unnecessary, are now necessary and imperatively demanded. In the same manner we should often remove restraints which are no longer necessary.

As scientific knowledge and intelligence increases, and Democracy grows, this interest in the individual, and in the state, not as an abstract entity but as a collection of individuals, must also grow, and often our legal theories must be radically changed.

When Mr. Tiedman, in his admirable work on the "State and Federal Control of Persons and Property," said,—
 "The police power of the Government cannot be brought into operation for the purpose of exacting obedience to the rules of morality and banishing vice and sin from the world. The moral laws can exact obedience only *in foro conscientie*. The municipal law has only to do with trespasses. It cannot be called into play in order to save one from the evil consequences of his own vices, for the violation of a right by the action of another must exist or be threatened in order to justify the interference of law,"²—
 he no doubt stated what, for a long time, was held to be an established rule. How opposed is the rule, however, to any healthy national growth, and how grounded in the fatuities of medievalism. How opposed is it to the opinion of the Supreme Court of the United States, itself, that
 "The State still retains an interest in one's welfare, however reckless one may be. The whole is no greater than the sum of all the parts, and when individual health, safety and welfare are sacrificed, or neglected, the state must suffer."³

² Page 181.

³ See opinion in *Holden v. Hardy*, 169 U. S. 366.

It is true that private vices were not generally punished under the early Common law. It is also true that originally the majority of public offences were considered private and the rule of private compensation, and of private revenge, was practically the only rule. It is probably true that the Court of King's Bench had, originally, criminal jurisdiction over offences which were committed in the royal curtilage merely, and that the offences of which cognizance was originally taken were those merely which were deemed committed against the peace and dignity of his Majesty the King, and that other offences and those committed outside of the curtilage were the subjects merely for individual compensation and individual revenge. But how foolish, how unsocial was this theory! No man, as a matter of fact, "liveth unto himself" nor "sinneth unto himself," and there is no vice and no wastefulness which is destructive of one's self, or of one's property, which does not react harmfully on the community as a whole. Of course there is such a thing as a reasonable and an unreasonable interference. That which is unreasonable can always, under our constitutions, be prevented as an interference with liberty without due process of law, but the fact that the vice or wastefulness, is indulged in in private, or with one's own property, does not make a legislative inhibition by any means necessarily unreasonable. The time has come when we must do away with the petty distinctions of the middle ages and cease from explaining exceptions, which are really not exceptions at all, by antiquated theories and rules. Living issues must be settled on grounds of ever-living, ever-present, common sense. That is to say—if we ever expect the public, as a whole, to respect and yield obedience to the law and to the courts, or to make the law itself sufficiently elastic for our growing needs. One great reason, indeed, why the courts and the law are in the disrepute that they undoubtedly are in to-day, is that our judges, instead of explaining their decisions and holdings on grounds of fundamental sense, logic and equity, often write volumes in attempting to reconcile these decisions with those of the

past or of neighboring jurisdictions, many of which have been based on a social thought and a social system, in itself, radically wrong or decided under conditions which are totally dissimilar. If, indeed, we may not prevent private vice, what right have we to punish attempted suicide? It is not enough to say that the old Ecclesiastical law punished such acts, for, to-day, we have no Ecclesiastical law. The foundation for the rule to-day, can only be that the state can be no stronger than the sum of all its parts and that the self-destruction of only one citizen tends to lessen that united strength.⁴ It is on this theory that we really regulate the employments of women and children, though many of our courts, in sustaining the statutes, see fit to resurrect the feudal theory that the child and the woman are wards of the state and can be dealt with differently than others. On this theory we certainly can adopt reasonable regulations that tend to the prevention of private vices which lead to a debilitated citizenship, even though they are indulged in individually and alone. Attempted suicide, indeed, is punishable, whether attempted on a public highway or in the privacy of one's own chamber, and the use of opium or morphine, and to a large extent of intoxicating liquors, is a suicide to a greater or lesser degree. The same is true of the foolish waste of one's substance, especially if that substance, as is the case with standing timber and gas and oil, is one in which the future generations should have an interest or in which the public is itself directly concerned. In the Arctic regions there would be strong grounds for preventing the destruction of pack dogs, or of winter stores, even though privately owned. Legislation of this kind is not sumptuary in the proper sense of the term. Most of the sumptuary legislation of the past, of which so much complaint was made, was foolish and fanciful. It consisted in unreasonable interferences with liberty, which were by no means necessary for the protection of the public, or

⁴ This is one of the reasons given by Blackstone, though the insult to the Deity is the one which is chiefly emphasized. See opinion in *Holden v. Hardy*, 169 U. S. 366.

which were radically partial in their operation. The use of long shoes, or of cosmetics, or of paint, or of beaver coats, did not seriously affect the welfare even of the user. The evil of many of the old Sumptuary laws was that they were aimed, not to prevent waste or even individual harm, but to prevent the use by the common people of certain things which were limited in their output and which the rich and the governing classes themselves wanted. They did not aim at the prevention of waste but of use altogether.

But do our constitutional provisions, as construed by the courts, really prevent the safeguarding of our national property and our national life? Do the constitutional provisions that—"No state may, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any state shall be for the use of the Treasury of the United States and all such laws shall be subject to the revision and control of Congress,"—and the clause which gives to Congress the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes," deprive the states of the right to protect their own natural resources and to prevent their waste and extinction? Does the control which is vested in Congress over interstate commerce, and do the clauses of the fifth and fourteenth amendments—which forbid the deprivation of life, liberty and property without due process of law, or forbid the denial of the equal protection of the laws—prevent a state from putting its resources to the fullest and most beneficial use, and from conserving the same and the lives and health of its peoples? These are questions which are being raised every day and which will have to be dealt with more and more as our population increases, our resources become exhausted, and the struggle for existence grows keener and keener.

Perhaps the first case on the subject is that of *McCready v. Virginia*,⁵ in which the Supreme Court of the United

⁵ 94 U. S. 391.

States sustained the validity of an act of the legislature of Virginia, which forbade all persons, who were not citizens of the state, to plant or dig oysters in the soil covered by tide waters. The Supreme Court held, that this act was neither a regulation of commerce nor a violation of any privilege or immunity of national or interstate citizenship, since, subject to the paramount right of navigation—the regulation of which in relation to foreign and interstate commerce has been granted to the United States,—each state owns the bed of all tide waters within its jurisdiction. “The planting of oysters in the soil covered by the water owned in common by the people of the state,” the Court said, “is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purpose of cultivation and profit . . . and as all concede that a state may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow that it might, by appropriate legislation, confine the use of the whole to its own people alone. . . . The right, thus granted, is not a privilege or immunity of general, but of special, citizenship. It does not belong, of right, to the citizens of all free governments, but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. . . . They own it not by virtue of citizenship, merely, but of citizenship and domicile united; that is to say,—by virtue of a citizenship confined to the particular locality. . . . Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade.”

The next case is that of *Smith v. Maryland*,⁶ in which a vessel, licensed in the coasting trade, was seized by the Maryland authorities because of dredging for oysters in Chesapeake Bay, in violation of the statutes of the state. In it the statute was upheld on the theory of the exclusive ownership in the state of the soil beneath the waters and

⁶ 18 How. 71.

also because the soil was held by the state "not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish—shell fish as well as floating fish." The court, however, took particular care to add that the Statute of Maryland did not touch the subject of the common liberty of taking oysters, save for the purpose of guarding it from injury, to whomsoever it might belong, and by whomsoever it might be enjoyed. "Whether this liberty," it said, "belongs exclusively to the citizens of Maryland, or may lawfully be enjoyed in common by all citizens of the United States; whether the national Congress, by a treaty or Act of Congress, can grant to foreigners the right to participate therein; or what in general are the limits of the trust upon which the state holds this soil, or its power to define and control that trust—are matters wholly without the scope of this case and upon which we give no opinion."

The same reasoning is applied in the case of *Manchester v. Commonwealth of Massachusetts*,⁷ which follows, and in which a Statute of Massachusetts was sustained which regulated the use of nets or seines for taking fish in Buzzard's Bay, a bay wholly within the State of Massachusetts and whose mouth is less than two marine leagues in width. In it the statute was upheld, not so much on the ground of ownership as on the ground that the territory was within the jurisdiction of the state, and the regulation did not interfere with commerce. "The Statute of Massachusetts, which the defendant is charged with violating,"—the Court said—"is, in terms, confined to waters within the jurisdiction of the commonwealth, and it was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other states. If there be a liberty of fishing for swimming fish in the navigable waters of the United States, common to the inhabitants and the citizens of the United States (upon which we express no opinion), then the stat-

⁷ 11 Sup. Ct. Rep. 559.

ute may well be considered as an impartial and reasonable regulation of this liberty, and the subject is one which a state may well be permitted to regulate within its own territory, in the absence of any regulation by the United States. The preservation of fish, even although they are not used as food for human beings, but as food for other fish, which are so used, is for the common benefit; and we are of the opinion that the statute is not repugnant to the constitution and the laws of the United States."

The next case in order, and to be considered, is the case of *Geer v. Connecticut*.⁸ In it the Supreme Court held it competent for a state to prohibit the killing of game within its borders with the intention of procuring its transportation beyond the state limits, and to forbid the transportation of any such game outside of the state. The case is peculiar in that two of the judges, Mr. Justice Brewer and Mr. Justice Peckham, not having heard the argument, took no part in the decision, and two others, Mr. Justice Field and Mr. Justice Harlan, dissented.⁹ The majority of the court, however, seems to have repudiated the idea more or less entertained by the Norman kings, and expressed by Pothier in his *Traite du Droit de Propriete*,¹⁰ and which seems to have had its origin in the Salic law, that—"The right belongs to the king to hunt in his domain. His quality of sovereign gives him the authority to take possession, above all others, of the things which belong to no one, such as wild animals. The lords and those who have a right to hunt, hold such right, but from his permission, and he can affix to his permission such restrictions and modifications as may seem to him good,"¹¹ and sustained the

⁸ 16 Sup. Ct. Rep. 600.

⁹ Mr. Justice Peckham and Mr. Justice Brewer are and always have been the most pronounced individualists of the court.

¹⁰ Nos. 27, 28 and 32.

¹¹ No. 32. The laws of Solon claimed no ownership of the game in the State in any personal sovereign, but forbade the killing of game, "seeing that the Athenians gave themselves up to the chase to the neglect of the mechanical arts." Merlin, 4 *Repertoire de Jurisprudence*, p. 128.

right of the state to prohibit the exportation of game on the theory that it was a natural food supply, which needed protection and which, though not owned by the sovereign state or the sovereign monarch, belonged to all the people of the state in common and was held by the sovereign state in custody and trusteeship for them. It expressly recognized a property right in the people of the state which could not be enjoyed by an outsider, without the consent of such people, and which was not a privilege or immunity of national or interstate citizenship, and resolved the interstate commerce question in the negative.¹²

We now come to the consideration of the natural resources, of oil and gas, which are more or less migratory in their nature and have often been aptly termed minerals *feræ naturæ*. Of the cases on this subject the most important is that of *Ohio Oil Company v. Indiana*,¹³ which was decided by the Supreme Court of the United States in 1899. In it

¹² In connection with this case a decision of the Supreme Court of Wisconsin in the case of *Rosmiller v. State*, 89 N. W. Rep. 838, is worthy of consideration. A statute of that State imposed a tax on all ice cut on the meandered lakes of the State for export purposes. It seems to have been conceded on all sides that the tax would have been invalid if levied upon ice cut upon private waters, and the ownership of the State in the ice and the resulting right to sell the same to whomsoever and in whatsoever manner it chose was, therefore, the express and only theory on which the act was sought to be justified. The Court, however, held that the waters in the meandered lakes and in the flowing streams were not owned by the State as a State, but held in trust by the State for the use of all of its citizens. The duty of the State, the Court held, is "To preserve to the people of the State forever the common rights of fishing and navigation and such other rights as are incident to public waters at the common law." Such rights it held included the right to cut and use the ice thereon. This trusteeship, the opinion said, had again and again been held to be inviolable, the State being deemed powerless to change the situation by in any way abdicating its trust. It cited cases where the State had been held to be precluded from selling or granting away the bed of a lake, or allowing it to be drained, and it deduced from these cases the natural conclusion that it could not sell the water nor the ice. It therefore resolved the question into one of protection of the property of the State and the preservation of its use to the people thereof, and held that the exportation in the quantities threatened would neither materially lessen the water supply of the State nor so drain the lakes as to make them stagnant pools and injurious to health.

¹³ 177 U. S. 190; 20 Sup. Ct. Rep. 576, affirming: *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809; *Oil Co. v. Indiana*, 155 Ind. 461, 57 N. E. 912.

the court held, that a Statute of Indiana—which provided that it should be unlawful “to permit the flow of gas or oil from a well to escape into the open air without being confined within the well or proper pipes or other safe receptacle for more than two days after gas or oil should have been struck in the well,”—did not take the private property of the owners of the land without adequate compensation and therefore without due process of law, since the owner of the surface had no property right in the gas or oil until he had actually reduced it to possession, or, if he had any property right therein, it was a right in common with the co-equal right of other land owners to take from the common source of supply, and therefore subject to the legislative power to prevent a destruction of the common property by one of the common owners. The opinion in the case is one of much value, not merely because of its luminous explanation of the problems which surround the conservation of the oil supply, but because of its discussion of the case of *Geer v. Connecticut* and the distinction which it makes between the power of the state over animals and over minerals which are *feræ naturæ*. In its opinion the court says: “Without pausing to weigh the reasoning of the Indiana court, in order to ascertain whether they in every respect harmonize, it is apparent that the cases in question, in accord with the rule of general law, settle the rule of property in the State of Indiana to be as follows: Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil until these substances are actually reduced by him to possession, he has no title to them whatever as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. It is also clear from the Indiana cases cited that, in the absence of regulation by law, every owner of the surface within a gas field may prosecute his efforts and may reduce to possession all or every part, if possible, of the deposits, without violating the rights of the other surface owners.

If the analogy between animals *feræ naturæ* and mineral deposits of oil and gas, stated by the Pennsylvania court¹⁴ and adopted by the Indiana court,¹⁵ instead of simply establishing a similarity of relation, proved the identity of the two things, there would be an end of the case. This follows because things which are *feræ naturæ* belong to the 'negative community'; in other words, are public things subject to the absolute control of the state, which, although it allows them to be reduced to possession, may at its will not only regulate, but wholly forbid their future taking. But whilst there is an analogy between animals *feræ naturæ* and the moving deposits of oil and natural gas, there is no identity between them. Thus, the owner of the land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of someone else within the gas field. It being true as to both animals *feræ naturæ* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *feræ naturæ* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, everyone may be absolutely prevented from seeking

¹⁴ See *Brown v. Vandegrift*, 80 Pa. 142.

¹⁵ See *Townsend v. State*, 147 Ind. 624.

to reduce to possession. No divesting of private property under such a condition can be conceived, because the public are the owners, and the enacting by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character. On the other hand, as to gas and oil the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a co-equal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *feræ naturæ*, which it is unquestioned the legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession, may be ultimately efficaciously enjoyed. Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the State of Indiana which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners

without regard to the enjoyment of the others. Indeed, the entire argument upon which the attack on the statute must depend involves a dilemma, which is this: If the right of the collective owners of the surface to take from the common fund, and thus reduce a portion of it to possession, does not create a property interest in the common fund, then the statute does not provide for the taking of private property without compensation. If, on the other hand, there be, as a consequence of the right of the surface owners to reduce to possession, a right of property in them in and to the substances contained in the common reservoir of supply, then, as a necessary result of the right of property, its indivisible quality, and the peculiar position of the things to which it relates, there must arise the legislative power to protect the right of property from destruction. To illustrate by another form of statement the argument is this: There is property in the surface owners in the gas and oil held in the natural reservoir. Their right to take cannot be regulated without divesting them of their property without adequate compensation, in violation of the Fourteenth Amendment, and this although it be that if regulation cannot be exerted one property owner may deprive all the others of their rights, since his act in so doing will be *damnum absque injuria*. This is but to say that one common owner may divest all the others of their rights without wrongdoing, but the lawmaking power cannot protect all the owners in their enjoyment without violating the Constitution of the United States."¹⁶

So far there appear to be no cases, in the Supreme Court of the United States, which directly pass upon the question as to whether a state may prohibit the exportation of natural gas by pipes or otherwise, or the piping of oil outside of its borders; although the reasoning of the case of the *Ohio Oil Company v. Indiana* would seem to answer the question in the negative ¹⁷ unless with perhaps the qual-

¹⁶ See *State v. Ohio Oil Co.*, 150 Ind 21; *Oil Co. v. Indiana*, 155 Ind. 461.

¹⁷ *Hudson Water Co. v. McCarter*, 209 U. S. 349, 28 Sup. Ct. Rep.

ification suggested by the New York case of *Hathorn v. Natural Carbonic Gas Co.*,¹⁸ which we will afterwards consider. The Supreme Court of Indiana, however, in several noticeable cases of which *Townsend v. State*¹⁹ and *Manufacturers Gas and Oil Co. v. Indiana*²⁰ are perhaps the most important, although admitting that a state may prohibit the waste of its natural resources of oil and gas before they have been reduced to ownership, denies the right to prohibit that exportation after they have been properly reduced to individual possession. "In the case of wild animals, before they are reduced to possession," the Court says, "the ownership is in the public and not in any private person; and they are therefore held to be subject to the protection of the sovereign. The privilege of taking, killing and transporting them may, on this ground, be regulated by the legislature. As to natural gas, however, the public has no title to, or control over, the gas in the ground. On the contrary, so far as it is susceptible of ownership, it belongs to the owners of the superincumbent lands in common, or at least such land-owners have a qualified or limited ownership in it to the entire exclusion of the public. . . . It is not alleged in the complaint before us that the appellee is appropriating an undue proportion of the common fund or supply of gas, or that it is using any device or artificial means to produce an unnatural flow of gas from its wells to the injury of the appellants. Neither is it charged that the means adopted by the appellee, for transporting the gas are in any respects improper, dangerous to life or property, destructive of the common supply, or likely to inflict injury of any kind upon the appellants. The right of the appellee to take gas from its own wells in the manner adopted by it is not denied. Nothing done by the

529, would, perhaps, point to a different conclusion; but in this case navigable waters and the public were concerned and different considerations might apply.

¹⁸ 87 N. E. Rep. 504.

¹⁹ 147 Ind. 624, 47 N. E. 19.

²⁰ 53 L. R. A. 134.

appellees is complained of excepting only, that it removes natural gas out of the State of Indiana. No ground for the exercise of the police power of the state to prevent such removal is shown. Nothing save the naked right to transport the gas beyond the limits of the state is contested in this action. The only reason which can be urged in support of the restraint which is sought to be imposed, is that the supply of natural gas being limited, and the article being one of great value and convenience, its use ought to be reserved for and enjoyed by the people of this state, to the exclusion of the inhabitants of any other state. But as natural gas, when reduced to possession, is held to be a commercial commodity, its owners cannot lawfully be prevented from carrying it to, and selling it in, whatever market they may consider most advantageous."

Following this case, however, and almost a part of it, is the so-called "Flambeau Light Case,"²¹ in which the same tribunal takes an advanced and salutary position on the subject of the wasteful use of natural products and sustains a statute which seeks to prevent "the use of natural gas for illuminating purposes in what are known as Flambeau Lights." "It is true," the Court says in this latter case, "that natural gas when brought to the surface and secured in pipes is property belonging to the person in whose pipes it is secured. But the act in no way deprives the owner of the full and free use of his property. It restrains him from wasting the gas to the injury of others or to the injury of the public. It might present a very different and serious question whether the legislature has the power to prevent him from wasting his own property, if by so doing he in no way injured others, as appellants learned counsel erroneously assume. In *Gas Co. v. Tyner*²² this court, appropriating the language of the Supreme Court of Pennsylvania in *Gas Co. v. Dewitt*,²³ said: 'Water and oil, and

²¹ *Townsend v. State*, 147 Ind. 624, 47 N. E. Rep. 19; *Given v. State* 66 N. E. 750.

²² 131 Ind. 277.

²³ 130 Pa. 235, 18 Atl. Rep. 724.

still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals and unlike other minerals they have the power and tendency to escape without the volition of the owner. Their fugitive and wandering existence within the limits of a particular tract is uncertain. They belong to the owner of the land, and are a part of it, so long as they are on, or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his.' It is not to prevent an adjoining or distant owner from doing this, that the act in question was passed. But it was to prevent him from needlessly wasting the gas which he is drawing from the general reservoir which nature has furnished, and which, experience and prudence teach, is liable to be exhausted. It was further said in the Tyner case, from which we have just quoted: 'The rule that the owner has the right to do as he pleases with or upon his own property is subject to many limitations and restrictions, one of which is that he must have due regard for the rights of others. It is settled that the owners of a lot may not erect and maintain a nuisance thereon, whereby his neighbors are injured.' By the Tyner case *supra*, this court has likened natural gas and laws regulating the same, to wild game and laws regulating the taking of such animals. The Supreme Court of Minnesota in *State v. Rodman*,²⁴ having under consideration the constitutionality of a certain game law of that state, said: 'We take it to be correct that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as a proprietor, but in its sovereign capacity, as the representative and for the benefits of all its people in common. The

²⁴ 58 Minn. 393.

preservation of such animals as are adapted to consumption as for food, or to any other useful purpose, is a matter of public interest; and it is within the police power of the state, as the representative of the people in their united sovereignty, to enact such laws as will best preserve such game and secure its beneficial use in the future to the citizens, and to that end it may adopt any reasonable regulations, not only as to the time and manner in which such game may be take and killed, but also imposing limitations upon the right of property in such game after it has been reduced to possession.' ”

In this connection we should also notice the somewhat peculiar and contradictory case of *Hague v. Wheeler*,²⁵ to which we will again refer, and which, although it ignores the rights of the adjacent property owners, asserts, perhaps more emphatically and noticeably than any other decision, the rights of the community as a whole and of the consuming public. In this case the defendants caused a well to be drilled, on their premises, which produced gas in large, but in hardly paying quantities; but never used or marketed the same. Later their derrick was destroyed by fire and the gas escaped into the air. The defendants refusing or neglecting to shut it in, the plaintiffs did so at their own expense and the well remained in this condition for some time, when the defendants threatened to reopen the well and allow the gas to escape and be wasted as before. The plaintiffs, who were the owners of adjoining land in the same gas belt or area, sought to enjoin such reopening and such waste, alleging in their bill that the flow of gas from the well of the defendants was so great that it would, if allowed to go to waste, seriously and irrevocably injure their wells by draining the common supply. The court refused the injunction, and in doing so used the following language:

“The acts complained of were the drilling of the well in 1890, when the wells of both the plaintiffs were in full

²⁵ *Hague v. Wheeler*, 157 Pa. St. 324, 27 Atl. 714; *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317.

operation, and the subsequent failure to utilize or shut in the gas. The drilling of the well was accounted for, and the suggestion of malice or negligence therein negated by proof that it was done at the instance of the gas company. This company had a considerable gas plant, and was engaged in the supply of gas to its consumers for fuel. It was interested in the development of the region, and evidently expected to buy the defendants' well if it was of sufficient size to be capable of utilization. The defendants and the gas company could not agree upon the price of the well after it was drilled, but the fact that it was drilled at the request of the company, and not of the mere motion of the defendants, was an answer to any allegation of malice or negligence on the part of Hague as well as on the part of the company, since it accounted for the act of drilling by assigning a motive therefor, both lawful and neighborly. It will not do to say that an act thus accounted for as to one plaintiff may be assumed to be the result of malice or negligence as to the other, in the absence of proof to sustain the assertion. These plaintiffs stand on common ground. Neither of them can complain of the defendants for the act of drilling the well on their land on any other ground than the existence of malice or negligence. When the act is accounted for in such a manner as to show that it was not done with malice, or in negligence, but in good faith, as an act of ownership, and at the solicitation of the gas company, the character of the act is established, and as a basis of relief it falls out of the case. What have we then? Three landowners owning considerable holdings in the same basin, or overlying the same gas-bearing sand rock, each having an open gas well or wells on his land, drilled without malice or negligence, in a lawful manner, and for a lawful purpose. Two of these owners have been able to utilize the gas from their respective lands and find a market for it. One of them has not been so fortunate. He has gone from his well, but up to the time of the filing of this bill he has not been able to utilize or dispose of it, and his gas has gone to waste for

that reason. His more fortunate neighbors come into a court of equity, and ask that he shall not be permitted to let his gas run, because, while this gas is his own, underlying his tract, and finding its way to the surface through his well, it has a tendency to drain the sand rock, and so to reduce ultimately the flow of gas from their wells. This would be equally true if the defendants were able to utilize their gas; yet it is conceded that in that case their right to the gas from their well would be as incontestable as the right of the plaintiffs to use the gas from theirs. How is that right lost? By their inability to find a purchaser? If they can find a purchaser, or turn the well to any useful purpose, their right to the gas that flows from their well is conceded. If they cannot, their right is denied. Their well must be shut in, while their successful neighbors drain the entire basin through their open wells, and receive pay for the gas. This is a proposition to limit the power of the owner over his own by the use he is able to make of it. If he can sell his gas or his oil, or turn it to some practical purpose, his power over it as owner is unabridged. If he cannot find a purchaser, or a practical purpose to which to apply his yield of gas or oil, then his power as owner is gone. This would be an adaptation to actual business of the spiritual truth that 'to him that hath shall be given; but from him that hath not shall be taken away, even that which he seemeth to have.' Does the maxim, '*sic utere tuo non alienum lædas*,' require us to grant the relief sought in this case? If in burning the gas from their well the defendants should direct the jet towards the plaintiffs' buildings or timber, or should leave it uncontrolled, so that the wind might drive it against or towards the plaintiffs' property so as to injure or endanger it, a case would be presented in which the maxim would be applicable, and we should take pleasure in enforcing it. If the defendants' well produced nothing, and they were leaving it without plugging, so that the water might find its way into the sand rock, to the injury of others, we could punish them under the statute which prescribes the manner of plugging

an unproductive well, and makes it obligatory on the owner to adopt it. But we have a well drilled for a lawful purpose, in a lawful manner, and actually producing gas, which is not directed towards the property of another, or so consumed as to affect the buildings, timber, or crops of any adjoining owner. It is therefore not the use of the gas of which the plaintiffs complain. It is the production of it when the owner cannot sell it or turn it to any practical purpose. *Now, it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject.* Something has been done in this direction already, by the acts regulating the plugging of abandoned wells, *but it is not the public interest that is involved in this litigation.* It is the interest of an adjoining owner who seeks to appropriate to himself so much of his neighbor's gas as he cannot turn into money or use for some practical business purpose, and he asks a court of equity to hold his neighbor's hands by an injunction until this appropriation is accomplished. We cannot find any rule of law or any principle of equity on which such an injunction can rest. The scope of the golden rule may be sufficiently ample to cover this case, and it may be that it would require an owner to surrender to his neighbor so much of his own property as he could not turn to his own advantage, if his neighbor was so situated that he could profit by it. Assuming this to be so, the moral obligation so arising is not enforceable by civil process. The owner of timber may pile it in heaps, and burn it, as was done in the early settlement of the country, notwithstanding the fact that his neighbor has a saw mill and all the facilities for preparing the sawed lumber for market and converting it into money. The power of the owner of the timber over it is neither greater nor less because of his neighbor's readiness and ability to market it. An owner of land may have a deposit of coal under some portion of it so small in extent, or with such an inclination, as to make it impossible for him to mine through his own tract without a greater cost to him than the value of the

mined coal when brought to the surface. His neighbor may have an open mine that reaches it, and through which it could be brought at a fair profit. These circumstances do not affect the title of the owner of the coal, or confer any right on the adjoining mine owner; but it is said that the oil and gas are unlike the solid minerals, since they may move through the interstitial spaces or crevices in the sand rocks in search of an opening through which they may escape from the pressure to which they are subject. This is probably true. It is one of the contingencies to which this species of property is subject. But the owner of the surface is an owner downward to the center, until the underlying strata have been severed from the surface by sale. What is found within the boundaries of his tract belongs to him according to its nature. The air and the water he may use. The coal and iron or other solid mineral he may mine and carry away. The oil and gas he may bring to the surface and sell in like manner, to be carried away and consumed. His dominion is, upon general principles, as absolute over the fluid as the solid minerals. It is exercised in the same manner, and with the same results. He cannot estimate the quantity in place of gas or oil, as he might of the solid minerals. He cannot prevent its movement away from him, towards an outlet on some other person's land, which may be more or less rapid, depending on the dip of the rock or the coarseness of the sand composing it; but so long as he can reach it and bring it to the surface it is his absolutely, to sell, to use, to give away, or to squander, as in the case of his other property. In the disposition he may make of it he is subject to two limitations: he must not disregard his obligations to the public, he must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy or any positive provision of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, subject

to these limitations, his power as an owner is absolute, until the legislature shall, in the interest of the public as consumers, restrict and regulate it by statute."

This case, although adhering to what we believe to be an obsolete and unsocial theory of individualism and of individual property rights, can hardly be said to be reactionary. It takes such pains indeed to suggest that, though the adjacent property owner has no remedy, the public has, that all of its poison is extracted. It certainly is authority for the proposition for which we contend and the acceptance of which is absolutely necessary to the conservation of our natural resources and of our national virility, that individual wastefulness is a matter of public concern, and a fit subject for legislative regulation. In this particular the Pennsylvania court perhaps goes further than that of the other states and adopts what might almost be termed a Salic theory, although modified by the fact that the sovereign is to-day the consumer "his majesty, the American public," and adopts, in relation to oil and gas, a position somewhat similar to that now everywhere adopted, in America, in relation to game.

No one of the other courts, it will be noted, directly adopts this theory in relation to gas and oil. They merely emphasize the differences which the cases actually present, and the fact that there is a greater degree of, or claim for, complete ownership in the owner of the land on which the particular well is dug, in the case of oil and gas, than there is in the case of game; that though oil and game may both be, in a measure, migratory and *feræ naturæ*, game is so to a greater degree than is oil and gas; that game goes everywhere and belongs everywhere and that oil and gas, though more or less migratory, are confined to certain lands and to certain territories and are owned in common by the owners of those lands rather than by the people of the state as a whole. They all, however, with the exception of the Supreme Court of Pennsylvania—and it goes further—pave the way for, and suggest the holding and important distinction which was only yesterday made by

the Supreme Court of New York in the case of *Hathorn v. Natural Carbonic Gas Co.*,²⁶ to the effect that, although after reduction to possession, the right of property is complete, the method of reduction must be natural and reasonable and must not only not be wasteful but must not be calculated to deprive the other land owners who have a common interest in the supply of their legitimate rights. In the case in question the New York Court of Appeals was called upon to pass upon the validity of a statute which was enacted for the protection of the natural mineral springs of the State of New York and which prohibited the acceleration or increase of the flow of percolating waters, or natural carbonic acid gas, from wells bored into the rock by pumping or any artificial contrivances whatsoever: First, absolutely and without qualification; second, when the result of so doing would be to impair the natural flow or the quality of the waters or gas in the spring or well of another person; third, when the object of so doing was to extract and collect the carbonic acid gas for market. The court held that the first and second prohibitions were unconstitutional and took away the use and enjoyment of private property, as they seemed to prohibit a land owner from extracting, by means of the simplest and most modest contrivance, waters from a bored well on his premises for purposes connected with the use of his premises, if the well was in rock and the water contained mineral salts and carbonic acid gas, even if it did not interfere with others; while, as a matter of law, he had a vested right to draw percolating water from under his lands, by pumps or otherwise, for purposes legitimately connected with the enjoyment of his lands even though it interfered with others. The third prohibition, however, the court held to be constitutional. The landowner, it maintained, has no vested right, unnaturally and unreasonably, to force the flow of percolating waters for any purpose not connected with the use or enjoyment of his land. The court in its opinion

²⁶ 87 N. E. 504.

stated the question at issue to be—"Whether a landowner has the right, by the use of pumps and other apparatus, greatly to accelerate and increase the natural flow of subterranean percolating mineral waters and gas through deep wells, bored into a widely extended common supply of such substances, not for any purpose connected with the enjoyment of his lands, but for the purpose of procuring from the waters a supply of gas to be marketed throughout the country, and with the result of wasting great quantities of mineral waters, and of destroying or impairing the natural flow of such waters and gas in and through the springs of other landowners throughout a large area, and of destroying or impairing the valuable character of such waters for the purposes for which they have been habitually used." In passing upon the problem it, among other things, said: "The earlier decisions, in this and other states, laid down the general rule that a landowner might not be enjoined from doing an act on his own premises which resulted in diverting or even wholly destroying the flow of percolating waters from, or upon, his neighbor's lands. In thus holding they but followed the rule laid down in the leading case of *Acton v. Blundell*, 12 M. & W. 324, wherein was approved the principle 'which gives to the owner of the soil all that lies beneath its surface, that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure, and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action.' It will hardly be profitable to consider all of the different reasons which led the courts to adopt these principles, but it is important to bear in mind that they were invariably applying them to cases in each of which the party complained of had interfered with the enjoyment by another of percolating waters by some act which was directly and naturally connected with the improvement or

enjoyment of his own land. Thus in the Acton case the act, which resulted in the interference complained of, consisted in mining operations on a man's own land. In the case of *Ellis v. Duncan* the person intercepting the flow of percolating waters on his neighbor's land had done so by digging a trench or ditch and opening a quarry on his premises. No question was presented in these cases of a landowner depleting or exhausting a common supply of underground waters by artificial methods for purposes not in any way connected with the enjoyment or use of his own lands. But with the increased demands upon natural resources, such as water, this question did begin to arise. It seems to have been first suggested in England, in the case of *Chasemore v. Richards*, 7 H. L. Cas. 349. There the question arose whether the flow of percolating waters on another's land might be diverted or destroyed by pumping for purposes of supplying a municipality with water; and, while it was finally held that this might be done, it was only after the right had been seriously questioned. In this state it was first discussed, though not actually involved, in *Smith v. City of Brooklyn*, and it was there stated, by Judge Hatch, that the right in this state had never 'been upheld in the owner of land to destroy a stream, a spring, or well upon his neighbor's land, by cutting off the source of its supply, except it was done in the exercise of a legal right to improve the land or make some use of the same in connection with the enjoyment of the land itself, for purposes of domestic use, agriculture, or mining or by structures for business carried on upon the premises.' Finally, in the case of *Forbell v. City of New York*, the question reached this court, and the necessity was recognized, not for an alteration of the rules which had been applied by earlier cases to the facts then presented, but rather for an enlargement and extension of such rules so that they would be applicable to new conditions. That case, for the first time in this state, at least laid down the rule of the reasonable use of percolating waters, which I think is applicable to, and controlling of, the facts in this case.

There the City of New York tapped waters percolating under some lands purchased by it, and which were part of a connected system or supply extending over a large area, and then by powerful apparatus so forced the flow of this water as to exhaust the supply which had formerly supplied plaintiff's land, and this was done for the purpose of furnishing a supply of water for the defendant. The court, reviewing many earlier cases passing upon the right of a landowner to enjoy the subsurface waters under his premises, said: 'In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized. In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent, to us, that he should dig wells, and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its consumers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped and their value impaired. The principles thus adopted in the Forbell case have been fairly upheld in the courts of other states.' "

On the question of irrigation and the agricultural and industrial use of our waterways, there is much law and much law to be settled and made. The courts of the coun-

try at large will soon be called upon to definitely decide whether they will follow the so-called riparian doctrine, which is, that "those who own the soil adjacent to running streams are held to own the soil to the center line of the stream and, as an inseparable incident to that ownership, to be entitled to have the water flow as it has been accustomed to flow from time immemorial, without material diminution or alteration," or whether the newer doctrine of "beneficial use and priority of use" which has so generally prevailed in the mining and arid states, will apply. The Supreme Court of the nation will also be called upon to decide, whether the duty of the nation to preserve the navigability of our watercourses is paramount, or can be surrendered to the increasing demands of the West for more water for irrigation and of the East and South for more water for power.

So far the doctrine of prior and beneficial use has had the ascendancy in America, especially in the arid sections of the West. The doctrine grew up because, without the water, without irrigation, much of the West would have been a desert waste, and without the right to divert the streams, the mining industry would have been at a standstill. It has been applied not merely for the benefit of the riparian owners, but for those within the same watershed, who, in many states, have often been conceded the right to construct their ditches and pipes through the property of the riparian owners and to convey the water over enormous distances. The question has even assumed the dignity of a state controversy on account of the fact that the inhabitants of the state of Colorado, under the law of beneficial use and prior occupancy, which prevails in that state, have exhausted the waters of the Rio Grande, the Platte, the Arkansas, and the Big Laramie Rivers, and although by doing so have made the desert blossom within their own borders, have left to the states of New Mexico, Nebraska, Kansas and Wyoming nothing but dry riverbeds.

Under the old theory of a use only by the riparian owner to an extent which would leave the flow as it has existed

from time immemorial without material diminution or alteration, the riparian owners on the lower parts of the streams and in the adjoining states would have abundant cause for complaint. But even they could not use these streams for irrigation or for mining purposes; and the doctrine of state sovereignty also intervenes. As Mr. Platt Rogers, of Denver, remarked in a recent address before the American Bar Association: "If such be the case," that is, if the riparian doctrine applies as between states, "all that you see of lawns, fields and orchards exists by the grace of our adjoining and sister states, and the independence of Colorado, and its sovereignty within its own domains, is a myth. This great fabric of intermingled law and labor is, we are sorry to say, in the judgment of the Kansas legislature and her Attorney General, a house of cards."

In passing upon the question, however, the Supreme Court of the United States seems to have practically adopted the doctrine of prior and beneficial use, even as between the inhabitants of different states or the different states themselves. It, however, hints at a doctrine of equality of use as between the several states and of an ownership in common between them, as is the general holding in regard to the several owners of an oil or gas area. "Summing up our conclusions," the Court says,²⁷ "we are of the opinion that the contention of Colorado of two streams cannot be sustained; that the appropriation of the waters of the Arkansas by Colorado, for the purposes of irrigation, has diminished the flow of water into the State of Kansas; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields, and rendering possible their occupation and cultivation when otherwise they would have continued barren and unoccupied; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas valley in the State of Kansas, particularly

²⁷ See *Kansas v. Colorado*, 185 U. S. 125.

those portions closest to the Colorado line, yet to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both states, and the right of each to receive benefit through irrigation and in any other manner from the waters of this stream, we are not satisfied that Kansas has made out a case entitling it to a decree. At the same time, it is obvious that if the depletion of the waters of the river by Colorado continues to increase, there will come a time when Kansas may justly claim that there is no longer an equitable division of benefits, and may rightfully call for relief against the action of Colorado, its corporations and citizens in appropriating the waters of the Arkansas for irrigation purposes."

In so far as the waters which are entirely within a state are concerned, the proprietary rights of the people of that state and the interest of the state, as trustee or guardian of the interests of its people, seems to be fully recognized by the Supreme Court of the United States, and the doctrine of *McCready v. Virginia* to have, in these modern days, been amplified and confirmed. This, at any rate, is the conclusion to be reached from a perusal of the case of *Hudson County Water Co. v. Robt. H. McCarter, Atty. Gen. of the State of New Jersey*,²⁸ in which the water company was enjoined, under a contract with the City of Bayonne, in New Jersey, from laying mains in that city for the purpose of carrying water to Staten Island in the State of New York, the water to be drawn from the Passaic River, and a statute was upheld which provided that it should be "unlawful for any person or corporation to transport or carry through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this state into any other state for use therein."

"All rights," the court says in its opinion, "tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular

²⁸ 28 Sup. Ct. Rep. 529.

right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what would otherwise be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot, wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain. It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the state, as a *quasi* sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned.²⁹ What it may protect, by suit in this court, from interference in the name of property outside of the state's jurisdiction, one would think that it could protect, by statute, from interference in the same name within. On this principle of public interest and the police power, and not merely as an inheritor of a royal prerogative, the state may make laws for the preservation of game, which seems a stronger case.³⁰ The problems of irrigation have no place here. Leaving them on one side it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the

²⁹ Citing *Kansas v. Colorado*, 185 U. S. 125, 22 Sup. Ct. Rep. 552; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 27 Sup. Ct. Rep. 618.

³⁰ Citing *Geer v. Connecticut*, 161 U. S. 519.

interest of the public of a state to maintain the rivers that are *wholly* within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit, for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as the population grows. It is fundamental, and we are of the opinion, that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of police power, of what otherwise would be private rights of property, or that, apart from statute, those rights do not go to the height which defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights, that an agreement of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows. The private rights to appropriate is subject, not only to the rights of lower owners but, to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health. We are of the opinion further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to an æsthetic analysis. An analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will. The defense under the Fourteenth Amendment is disposed of by what we have said. That, under Article I, Section 10, needs but a few words more. One whose rights, such as they are, are subject to state restriction, cannot remove them from the power

of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter.³¹ But the contract, the execution of which is sought to be prevented here, was illegal when it was made. The other defense also may receive short answers. A man cannot acquire a right to property by his desire to use it in commerce among the states. Neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered in this respect by *Geer v. Conn.*,³² and the same decision disposes of the argument that the New Jersey law denies equal privileges to the citizens of New York. It constantly is as necessary to reconcile, and to adjust, different constitutional principles, each of which would be entitled to possession of the disputed ground, but for the presence of others, as we already have said that it is necessary to reconcile and to adjust different principles of the common law.³³ The right to receive water through pipes is subject to territorial limits by nature, and those limits may be fixed by the state within which the river flows, even if they are made to coincide with the state line. Within the boundary citizens are as free to purchase as citizens of New Jersey. But this question does not concern the defendant, which is a New Jersey corporation."³⁴

There seems, then, to be no question that wasteful and injurious methods of use may be forbidden where others have a residuary interest, or an ownership in common, in the article or property.³⁵ Such is undoubtedly the case with percolating waters; and in those states and places where oil and gases are held to be percolating in their nature or

³¹ Citing *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 23 Sup. Ct. Rep. 531; *Manigault v. Springs*, 199 U. S. 473.

³² 161 U. S. 519.

³³ Citing *Asbell v. Kansas*, 209 U. S. 485.

³⁴ The Wisconsin case of *Rosmiller v. State*, 89 N. W. 238, which at the first glance might appear to be opposed to this decision, may be easily reconciled if we remember that in it there was no evidence or suggestion or argument that there was not enough ice and to spare, and that the exportation thereof threatened either the water supply or the health of the people of the State in any way.

³⁵ But see, *contra*, *Hague v. Wheeler*, 157 Pa. St. 324.

to exist in underground streams with gases and oils. It is true of running waters. It may even be true of forests and of mineral deposits.⁸⁶ Some courts even go further and hold, that the use must be one which either improves the land of the user or makes it possible to make some use of the same in connection with its enjoyment for purposes of domestic use, agriculture or mining, or by structures for business carried on upon the premises.⁸⁷ The more general and better rule, however, seems to be that the use must be reasonable; that the owner of the land or of the natural deposit or supply may use it for means not connected with, or necessary for, the enjoyment of his land; but he may not, by extraordinary means and for such foreign purposes, exhaust or materially diminish the sources and supply which originate or are found on the properties of others.⁸⁸ "In the cases in which the lawfulness of interference with percolating waters has been upheld," says the Supreme Court of New York, in the case of *Forbell v. City of New York*,⁸⁹ "either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized. In the absence of contract or enactment, whatever it is reasonable for the owner to do with his surface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells, and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land, as land, may serve. He may consume it, but must not discharge it to the injury of others.

⁸⁶ See opinion of Justices, 103 Maine, 506.

⁸⁷ See cases cited and discussed in *Hathorn v. Carbonic Gas Co.*, 87 N. E. Rep. 504.

⁸⁸ See cases cited and discussed in *Hathorn v. Carbonic Gas Co.*, 87 N. E. Rep. 504.

⁸⁹ 164 N. Y. 522, 58 N. E. 644.

But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and, by merchandizing it, prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped and their value impaired."

The number of cases, indeed, which deny the right to a use of one's real property which is detrimental to others, and which concede the right of the legislature to interfere for the good of the public as a whole, is fortunately growing and the reasoning of the so-called "Spite Fence Cases" is becoming more and more to be discountenanced. "Rights of property," says Mr. Justice Shaw, in the case of *Commonwealth v. Tewkesbury*,⁴⁰ "like all other social and conventional rights, are subject to such reasonable limitation in that enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in it by the constitution, may think necessary and expedient," and there should be no dissent to this statement. The "Spite Fence Cases," indeed, —in their concession of an almost unlimited right of use to the owner of real property, and in holding that he may build any structure thereon that he may desire, however useless, and suggested by no matter what malicious motives, as long as he does not trespass on the lands of others, or impair the right of lateral support, or commit a public nuisance,⁴¹ —merely pretend to express the Common law and rarely deny, or negative, the right of the legislature to prohibit uses which are useless to the owner and injurious to others.⁴² In recent years, indeed, the courts have gone even further. The Supreme Court of the United States, in the

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⁴¹ *Letts v. Kessler*, 54 Ohio St. 73, and cases cited in notes to this case in 40 L. R. A. 177.

⁴² See cases cited in notes to *Letts v. Kessler*, 40 L. R. A. 177.

recent case of *Georgia v. Tennessee*,⁴³ has enjoined a Tennessee corporation from so smelting its ores so as to injure the forests of Georgia, the Supreme Court of Pennsylvania has by *dicta*, at any rate, conceded the right of the legislature to prevent the waste of natural gas in order that the consuming public may not suffer and may be benefited,⁴⁴ and the Supreme Court of the State of Maine has recently given an answer in the affirmative to the question—"In order to promote the common welfare of the people of Maine by preventing or diminishing injurious drought and freshets, and by protecting, preserving, and maintaining the natural water supply of the springs, streams, ponds and lakes, and of the land, and by preventing or diminishing injurious erosion of the land and the filling up of the rivers, ponds, and lakes, and as an efficient means necessary to this end, has the legislature power under the constitution by public general law to regulate or restrict the cutting or destruction of trees growing on wild or uncultivated land, by the owner thereof, without compensation therefor to such owner?"⁴⁵ So, too, it is now well settled that a state, as a trustee of the welfare of all of its citizens, may protect its property and natural resources against other states and their peoples, even though the ownership of such property and resources may have passed into private hands.⁴⁶ These cases are healthy and stimulating. Even if in certain respects subject to technical criticism, they, at any rate, evince a determination to act upon broad lines of public policy and to not allow Anglo Saxon and revolutionary individualism, and the apparent exigencies of the moment, to militate against the public interest whether that interest be present or future.

As applied to our natural resources, indeed, the theory of an absolute ownership is illogical and absurd and the

⁴³ *Georgia v. Tennessee Copper Co.*, 206 U. S. 230.

⁴⁴ *Hague v. Wheeler*, 157 Pa. St. 324.

⁴⁵ Opinion of the Justices, 103 Me. 506.

⁴⁶ *Kansas v. Colorado*, 185 U. S. 125; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230.

doctrine of the so-called "Spite Fence Cases" is barbarous and reactionary. It is, in fact, doubtful whether the ownership of land, or even the right to carry on business, was at any time in our legal history absolute and unrestricted. It was certainly not so under the feudal system and in feudal England, nor even in the Saxon and English England which came before. The constitutional provisions to the effect that "no person shall be deprived of life, liberty or property, without due process of law," and that "private property shall not be taken for a public use without just compensation being made therefor," and which guarantee the "equal protection of the laws," could certainly have never been intended to authorize private uses which were unsocial in their nature. They were merely intended to prevent legislative action which was such. The doctrine of the "Spite Fence Cases," indeed, and of the Pennsylvania Court, in the case of *Hague v. Wheeler*, except in so far as the latter case concedes the right of the legislature to interfere on behalf of the consuming public, is socially wrong. It is based on an individualism which has no foundation in legal history and which this age will not tolerate. Our recent decisions, indeed, when taken as a whole, point more and more to the conclusion that our courts stand ready to lend their sanction to any and all reasonable legislation which shall look towards and encourage, and that they themselves will, from time to time, formulate a judge-made law which shall encourage the creation of a jurisprudence, both state and national, which shall cease to surrender our national resources and national virility to the fetich of individual liberty and private right of property. They are beginning to resolve the question—"Am I my brother's keeper?"—in the affirmative, and to recognize the existence of a common humanity and of a state and national solidarity. They are beginning to evince a concern for the generations that are to come and for the states and the nation of the future which those generations will compose. They are coming to realize, as never before, that the welfare of the state is the highest law; that the whole is made up of the

sum of all of its parts, and that if the individual citizen suffers and is retarded in growth and development, the state itself is to that extent weakened and undermined.

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